

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

AT&T MOBILITY, LLC  
Respondent

and

Case 05-CA-178637

MARCUS DAVIS, an Individual  
Charging Party

**COUNSEL FOR THE GENERAL COUNSEL’S RESPONSE TO THE  
BOARD’S NOTICE TO SHOW CAUSE OPPOSING REMAND**

**I. Procedural Background**

On October 14, 2016, the Regional Director for Region Five issued a Complaint and Notice of Hearing (the Complaint) alleging that AT&T Mobility, LLC (Respondent) violated Section 8(a)(1) of the Act in two ways. First, the Complaint alleged that Respondent maintained an unlawful rule—known as the Privacy of Communications rule—that restricted employees from recording at Respondent’s facilities. Second, the Complaint alleged that Respondent unlawfully threatened employees with discharge if they violated the Privacy of Communications rule. The Honorable Deputy Chief Administrative Law Judge Arthur J. Amchan (the ALJ) issued his decision April 25, 2017, concluding that both Respondent’s Privacy of Communications rule and Respondent’s threat to enforce that rule violated Section 8(a)(1) of the Act. (*See* ALJD at 5.)

On September 28, 2018, the Board issued a Notice to Show Cause. The Board observed that the ALJ had applied the “reasonably construe” prong the Board’s analysis under *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), in analyzing that the Privacy of Communications rule violated Section 8(a)(1) of the Act. (Notice to Show Cause at 1.) The

Board further observed that its decision in *The Boeing Company*, 365 NLRB No. 154, slip op. at 14–17 (2017), overruled the *Lutheran Heritage* “reasonably construe” analysis and announced a new standard that applies retroactively to all pending cases. (*Ibid.*) Accordingly, the Board asked why the unlawful rule allegation should not be severed and remanded to the judge for further proceedings consistent with *Boeing*. (*Ibid.*) The Board also asked whether remanding the unlawful rule allegation would affect the Board’s ability to resolve the threat allegation.

## **II. The Board Should Not Remand Either Allegation**

The General Counsel opposes remand as to either allegation in this matter. First, the General Counsel has concluded the Privacy of Communications rule at issue in this case is no longer an unfair labor practice under the Board’s analysis in *Boeing*. Accordingly, the General Counsel opposes remand of the rule allegation to the ALJ for further proceedings. Instead, the General Counsel asks that the Board dismiss the complaint allegation that the Privacy of Communications Rule violated Section 8(a)(1) of the Act.

Second, the General Counsel opposes remand of the threat allegation. In *Boeing*, the Board emphasized an employer may violate the Act if it applies an otherwise lawful rule to employees who have engaged in protected activity. *See* slip op. at 4–5, 15–16 & fns. 15, 76, 83–84. Here, the ALJ determined that Marcus Davis (the Charging Party) was engaged in protected activity when he recorded a disciplinary meeting. (ALJD at 5.) Further, the ALJ concluded that the Respondent unlawfully threatened the Charging Party with discipline if he violated the rule while engaged in protected activity. (*Ibid.*) Regardless of whether Respondent could lawfully maintain the Privacy of Communications rule, Respondent’s agent threatened to apply the rule to restrict protected activity. In this regard, the record and briefs before the Board are sufficient to determine whether Respondent’s threat violated Section 8(a)(1) of the Act. The General Counsel

therefore opposes remand of the unlawful threat allegation and contends that the Board should conclude that the threat was unlawful.

### **III. Conclusion**

For the reasons set forth above, counsel for the General Counsel respectfully requests that the Board decline to sever or remand either allegation in this matter.

Dated at Washington, D.C., on October 11, 2018, and respectfully submitted by:

/s/ Paul J. Veneziano

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## CERTIFICATE OF SERVICE

I hereby certify that Counsel for the General Counsel's Response to the Board's Notice to Show Cause Opposing Remand was filed electronically on October 11, 2018, and, on the same day, copies were electronically served on the following individuals by e-mail:

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